

BILL ANALYSIS

S.B. 1451
By: Hinojosa
Criminal Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

In Texas, increasingly sophisticated criminal organizations utilize advanced tactics to first place, then layer, and ultimately integrate into mainstream circulation the proceeds acquired or derived directly or indirectly from unlawful activity.

"Structuring" is the act of depositing money in smaller increments in order to avoid the reporting requirements set forth in the Bank Secrecy Act. Current law requires anyone who executes a cash transaction of \$10,000 or more to file a currency transaction report (CTR). In an effort to skirt this regulatory requirement, many suspects engaged in money laundering will make multiple deposits on the same day in increments of less than \$10,000 to avoid this. Under federal law, this is a felony.

The goal is to make "structuring" a state crime. The problem with the existing money laundering statute is that it criminalizes the possession or transfer of money that is the "proceeds" of criminal activity; therefore, the crime has to precede the possession or transfer. However, that is not the situation in a money laundering case because the crime occurs contemporaneously with the possession or transfer.

Furthermore, the state's ability to prosecute structuring violations would be further strengthened by expressly providing that violations of the Bank Secrecy Act constitute a state money laundering offense.

Also, in asset forfeiture cases, state and local officers can only seize funds or property that officers can prove were the proceeds of the illicit activity, or were purchased with illicit funds. Frequently in investigations, officers are stymied by the fact that they are working with historical information, and the only funds that they can prove were obtained illegally are already gone. Investigators, for instance, may have historical records showing the use of structuring to launder the proceeds of narcotics trafficking. The investigator's bank records go back one year, and the total amount of money laundered was \$1 million. When the officers serve the seizure warrant, they can only obtain the money that is currently in the account, which may be considerably less than \$1 million.

Federal law allows for the seizure of substitute assets that law enforcement can show were purchased with funds derived from criminal activity—as well as assets not derived from criminal activity up to the amount realized as the gain from criminal activity—which means they can seize cars, homes, personal property, et cetera, as recovery for the amount laundered but no longer in possession. S.B. 1451 allows state and local officers to seize substitute assets in order to more effectively punish the criminals who engage in money laundering.

S.B. 1451 amends current law relating to the prosecution of the offense of money laundering and to the forfeiture of certain contraband.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

SECTION 1. Amends Articles 59.01(1) and (2), Code of Criminal Procedure, to redefine "attorney representing the state" and "contraband."

SECTION 2. Amends Article 59.011, Code of Criminal Procedure, as follows:

Art. 59.011. ELECTION OF FORFEITURE PROCEEDING. Authorizes the attorney representing the state, if property described by Article 59.01(2)(B)(ix), (x), or (xi), rather than Article 59.01(2)(B)(x), (xi), or (xii), is subject to forfeiture under this chapter and Article 18.18, to proceed under either this chapter or that article.

SECTION 3. Amends Chapter 59, Code of Criminal Procedure, by adding Articles 59.021, 59.022, 59.023, and 59.024, as follows:

Art. 59.021. FORFEITURE OF SUBSTITUTE PROPERTY. (a) Defines, in this article, "substitute property."

(b) Authorizes substitute property to be seized under authority of a search warrant issued under Subsection (c) if property that is contraband:

(1) can no longer be located after the exercise of reasonable diligence;

(2) has been transferred, conveyed, sold to, or deposited with a person other than the owner or interest holder;

(3) is not within the jurisdiction of the court;

(4) has substantially diminished in value;

(5) has been commingled with other property and cannot be readily distinguished or separated; or

(6) is proceeds described by Article 59.01(2)(C) and was used to acquire other property that is not within the jurisdiction of the court.

(c) Authorizes a district court to issue a search warrant authorizing a peace officer to seize substitute property if the officer submits an affidavit that states:

(1) probable cause for the commission of an offense giving rise to forfeiture of contraband;

(2) a description of the contraband involved and the estimated current fair market value of the substitute property to be seized;

(3) the reasons the contraband is unavailable for forfeiture;

(4) probable cause to believe that the owner of the substitute property owned or had an interest in contraband with an aggregate value of \$200,000 or more in connection with the commission of an underlying offense giving rise to the forfeiture; and

(5) that due diligence has been exercised in identifying the minimum amount of substitute property necessary to approximate the estimated highest fair market value of the contraband during the period in which the owner of the substitute property owned, or had an interest in, the contraband.

(d) Requires that the disposition, after seizure of the substitute property, proceed as other cases in this chapter except that the attorney representing the state must prove by a preponderance of the evidence:

(1) that the contraband described by Subsection (b) was subject to seizure and forfeiture under this chapter;

(2) the highest fair market value of that contraband during the period in which the owner of the substitute property owned, or had an interest in, the contraband;

(3) the fair market value of the substitute property at the time it was seized; and

(4) that the owner of the substitute property owned or had an interest in contraband with an aggregate value of \$200,000 or more in connection with the commission of an underlying offense giving rise to the forfeiture.

(e) Provides that for purposes of determining the aggregate value of contraband under Subsection (c) or (d), the owner or interest holder is not required to have simultaneously owned or had an interest in all of the property constituting contraband.

(f) Requires the court, if the fair market value of the substitute property seized exceeds the highest fair market value of the contraband described by Subsection (b) during the period in which the owner of the substitute property owned, or has an interest in, the contraband, to make appropriate orders to ensure that property equal in value to the excess is returned to the person or persons from whom the substitute property was seized.

Art. 59.022. PROPERTY REMOVED FROM THIS STATE. (a) Provides that this article applies to contraband, other than real property, that is determined to be located outside of this state.

(b) Requires a peace officer who identifies contraband described by Subsection (a) to provide the attorney representing the state a sworn statement that identifies the contraband and the reasons the contraband is subject to seizure. Authorizes the attorney representing the state, on receiving the sworn statement, to file, in the name of the state, a notice of intended forfeiture in a district court in:

(1) the county in which the contraband, or proceeds used to acquire the contraband, was known to be situated before its removal out of this state;

(2) the county in which any owner or possessor of the contraband was prosecuted for an underlying offense for which the property is subject to forfeiture;

(3) the county in which venue existed for prosecution of an underlying offense for which the property is subject to forfeiture; or

(4) Travis County.

(c) Requires the attorney representing the state to request that citation be served on any person who owns or is in possession or control of the contraband to which this article applies and, on

service in accordance with the Texas Rules of Civil Procedure, authorizes the attorney to move to have the court order that the contraband be returned or brought to the jurisdiction of the court or delivered to an agent of this state for transportation to the jurisdiction of the court.

(d) Entitles the attorney representing the state to all reasonable discovery in accordance with the Texas Rules of Civil Procedure to assist in identifying and locating contraband described by Subsection (a).

(e) Provides that if the court orders the return of contraband under this article, the contraband, after return, is subject to seizure and forfeiture as otherwise provided by this chapter.

(f) Authorizes the court, if it is found that any person after being served with a citation under Subsection (c) has transported, concealed, disposed of, or otherwise acted to prevent the seizure and forfeiture of contraband described by Subsection (a), to:

(1) order the payment to the attorney representing the state of costs incurred in investigating and identifying the location of the contraband, including discovery costs, reasonable attorney's fees, expert fees, other professional fees incurred by the attorney, and travel expenses;

(2) enter a judgment for civil contempt and impose a fine of not more than \$10,000 or less than \$1,000, confinement in jail for a term of not more than 30 days or less than 10 days, or both fine and confinement;

(3) enter a judgment of forfeiture of the person's interest in the contraband;

(4) enter a judgment in the amount of the fair market value of the contraband;

(5) impose a civil penalty of not more than \$25,000 or less than \$1,000 for each item of contraband, or each separate fund, of which the person transported, concealed, disposed, or otherwise acted to prevent the seizure and forfeiture; or

(6) order any combination of Subdivisions (1) through (5).

Art. 59.023. SUIT FOR PROCEEDS. (a) Requires a peace officer who identifies proceeds that are gained from the commission of an offense listed in Article 59.01(2)(A) or (B) to provide the attorney representing the state with an affidavit that identifies the amount of the proceeds and that states probable cause that the proceeds are contraband subject to forfeiture. Authorizes the attorney representing the state, on receiving the affidavit, to file for a judgment in the amount of the proceeds in a district court in:

(1) the county in which the proceeds were gained;

(2) the county in which any owner or possessor of the property was prosecuted for an underlying offense for which the property is subject to forfeiture;

(3) the county in which venue existed for prosecution of an underlying offense for which the property is subject to forfeiture;

(4) the county in which the proceeds were seized; or

(5) Travis County.

(b) Requires the court, if the court determines that, based on an examination of the affidavit described by Subsection (a), probable cause exists for the suit to proceed, to order that citation be

served on all defendants named in the suit in accordance with the Texas Rules of Civil Procedure.

(c) Provides that each person who is shown to have been a party to an underlying offense for which the proceeds are subject to forfeiture are jointly and severally liable in a suit under this article, regardless of whether the person has been charged for the offense.

Art. 59.024. MULTIPLE RECOVERY PROHIBITED. Authorizes the attorney representing the state to proceed under Article 59.02 (Forfeiture of Contraband), 59.021, 59.022, or 59.023, or any combination of those articles. Prohibits the court, if property or proceeds are awarded or forfeited to the state under this chapter for an underlying offense, from awarding or forfeiting additional property or proceeds that would exceed the highest fair market value of the contraband subject to forfeiture for that offense. Authorizes the highest fair market value to be calculated at any time during the period in which the applicable person owned, possessed, or had an interest in the contraband, for purposes of this article.

SECTION 4. Amends Article 59.06(p), Code of Criminal Procedure, to require the attorney representing the state, notwithstanding Subsection (a) (relating to requiring all forfeited property to be administered by the attorney representing the state), and to the extent necessary to protect the commission's ability to recover amounts wrongfully obtained by the owner of the property and associated damages and penalties to which the commission is authorized to otherwise be entitled by law, to transfer to the Health and Human Services Commission all forfeited property defined as contraband under Article 59.01(2)(B)(vi), rather than Article 59.01(2)(B)(vii).

SECTION 5. Amends Section 34.01(4), Penal Code, to redefine "proceeds."

SECTION 6. (a) Provides that the change in law made by this Act to Chapter 59, Code of Criminal Procedure, applies only to the forfeiture of property in relation to an offense committed on or after the effective date of this Act. Provides that forfeiture of property in relation to an offense committed before the effective date of this Act is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

(b) Provides that the change in law made by this Act to Section 34.01 (Definitions), Penal Code, applies only to an offense committed on or after the effective date of this Act. Provides that an offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.

(c) Provides that, for purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

EFFECTIVE DATE

Effective date: September 1, 2013.